No. 80-878

Supreme Court, U. S.
FILED
DEC 24 1980

IN THE

Supreme Court of the United States

October Term, 1980

ELLIS OLKON,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JACK NORDBY
430 Oak Grove Street
Suite 205
Minneapolis, MN 55403
(612) 874-6426
Counsel of Record
for Petitioner

WARREN R. SPANNAUS
Attorney General
State of Minnesota
102 State Capitol
St. Paul, MN 55155
THOMAS L. JOHNSON
Hennepin County Attorney
VERNON E. BERGSTROM
Chief, Appellate Section
MICHAEL McGLENNEN
Assistant County Attorney
THOMAS A. WEIST
Assistant County Attorney
ANNE E. PEEK, Esq.
By: VERNON E. BERGSTROM
Phone: 348-3127
A-2000 Government Center
Minneapolis, MN 55487
Attorneys for Respondent

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED

Should the United States Supreme Court grant a Writ of Certiorari to the Supreme Court of Minnesota when the state court has correctly applied the long-standing and settled law of this Court?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Statement of the Case	2
Arguments	
I. The Petitioner's Affirmative Defense Of Entrapment Was Properly Rejected By The Trial Court And By The Minnesota Supreme Court Which Correctly Applied The Overwhelmingly Prevailing View Of The Defense As Enunciated By The United States Supreme Court.	11
A. The Trial Court Found That No Entrapment Existed.	11
B. The Minnesota Supreme Court Correctly Followed The United States Supreme Court Decisions.	13
C. Petitioner Was Ready And Willing To Commit The Crimes Of Attempted Theft.	14
D. No Compelling Reasons Exist To Abandon The Subjective Test Of Entrapment.	18
II. Petitioner Was Not Denied Due Process.	20
A. The Law Of Entrapment Should Be Applied Uniformly In All Cases.	20
B. There Was No Denial Of Due Process.	21
Conclusion	24

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES

Page

Minnesota Decisions:

State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975) 11, 12, 19

State v. Olkon, —— N.W.2d —— (dec. August 29, 1980) 2, 4, 6, 7, 9, 10, 13, 15, 18, 21

State v. Poague, 245 Minn. 438, 72 N.W.2d 620 (1955) 21

Federal Decisions:

Green v. United States, 454 F.2d 783 (9th Cir. 1971) 22

Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976) 13, 15, 18, 19, 20, 22, 23

Lewis v. United States, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966) 15

Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) .....

Sherman v. United States, 356 U.S. 396, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) 13, 15, 20, 22

Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed.2d 413 (1932) 13, 15, 20, 22

United States v. Annese, —— F.2d —— (1st Cir., dec. September 22, 1980) 13

United States v. Archer, 486 F.2d 670 (2d Cir. 1973) 21, 22

United States v. Artnsa, 618 F.2d 192 (2d Cir. 1980) 13

United States v. Bocra, 623 F.2d 281, (3rd Cir. 1980) 13, 15

Page

United States v. Bradsby, 628 F.2d 901
(5th Cir. 1980) 13
United States v. Brandon, —— F.2d ——
(9th Cir., dec. October 22, 1980) 14
United States v. Caron, 615 F.2d 920
(1st Cir. 1980) 14, 23
United States v. Carreon, 626 F.2d 528
(7th Cir. 1980) 14
United States v. Dobson, 609 F.2d 840
(5th Cir. 1980) 14
United States v. Elordury, 612 F.2d 986
(5th Cir. 1980) 14
United States v. Fera, 616 F.2d 590
(1st Cir. 1980) 14, 15
United States v. Geders, 625 F.2d 31
(5th Cir. 1980) 14
United States v. Goodwin, 625 F.2d 693
(5th Cir. 1980) 14, 15
United States v. Grassi, 616 F.2d 1295
(5th Cir. 1980) 14
United States v. Hill, 626 F.2d 1301
(5th Cir. 1980) 14, 16, 18
United States v. Jabara, 618 F.2d 1319
(9th Cir. 1980) 11, 12, 14
United States v. Jannotti, —— F.Supp. ——,
28 Cr.L. 2241 (dec. November 26, 1980) 22
United States v. Jiminez, 613 F.2d 1373
(5th Cir. 1980) 14
United States v. Karas, 624 F.2d 500
(4th Cir. 1980) 14

Page

United States v. Keller, 624 F.2d 1154
(3d Cir. 1980) 14

United States v. Lentz, 624 F.2d 1280
(5th Cir., D.C. Cir. 1980) 14, 22

United States v. McMillan, 508 F.2d 101
(8th Cir. 1974) cert. denied 421 U.S. 916 (1975) .. 4

United States v. Meacham, 626 F.2d 503
(5th Cir. 1980) 14, 23

United States v. Murzyn, —— F.2d ——
(7th Cir., dec. October 3, 1980) 14

United States v. Navar, 611 F.2d 1156
(5th Cir. 1980) 14

United States v. Nunez-Rios, 622 F.2d 1093
(2d Cir. 1980) 14, 23

United States v. Ordner, 554 F.2d 24
(2d Cir. 1977) 15, 17

United States v. Russell, 411 U.S. 423,
93 S.Ct. 1537, 34 L.Ed.2d 355 (1973) .. 12, 13, 15, 17, 20

United States v. Till, 609 F.2d 288,
230 (5th Cir. 1980) .....

United States v. Twigg, 588 F.2d 373
(3d Cir. 1978) 22

United States v. Vallencia, —— F.2d ——
(2d Cir., dec. September 18, 1980) 14

United States v. Williams, 613 F.2d 560
(5th Cir. 1980) 12, 14

United States v. Wylie, 625 F.2d 1371
(9th Cir. 1980) at 1377 ..... 14, 22

Page

Foreign Decisions:

Grossman v. State, 457 F.2d 226 (Alas. 1969) 19

Constitutional and Statutory Provisions:

Minnesota Statutes, Chapter 595.02 (2) 1978) 21

18 U.S.C. §2313 16

U.S.C.A. Const. Amend 5, 14 .....

Rules:

Federal Rules of Criminal Procedure, 12 (b)(2) ... 23

Other Authorities:

Code of Professional Responsibility for Minnesota Lawyers, (Promulgated 1970), Canon 7 23

Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.San. Fran.L.Rev. 243 (1967) 19

Department of Health, Education and Welfare, *Annual Report*, Office Of Inspector General, January 1, 1979 — December 31, 1979 (March 31, 1980) 21

Park, *The Entrapment Controversy*, 60 Minn.L.Rev. 163 at 170 (1976) 19

United States National Commission of Reform of Federal Laws, A Proposed New Federal Criminal Code, Sec. 702 (2) (1971) 19

IN THE

Supreme Court of the United States

October Term, 1980

ELLIS OLKON,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

[Abstract of the statement of facts in majority opinion of *State v. Olkon*, —— N.W.2d —— (dec. August 29, 1980) Reprinted in Petitioner's Appendix A-2 through 22.]

In the winter of 1978 a Deputy of the Hennepin County Sheriff's Narcotics Division began an undercover investigation of medical and welfare fraud. In the course of his duties he visited a suspect, Dr. Robert Coifman, and complained of a sore throat and a stuffy nose. He received treatment from Dr. Coifman for various allergies and became known to Dr. Coifman as a regular patient. During these undercover operations with Dr. Coifman, Deputy Powers used the cover name of "Eugene Bowers". He continued to use this name in his subsequent investigation of a Minneapolis attorney, one Ellis Olkon, Petitioner herein. On two of "Bowers' " visits to Dr. Coifman, he was accompanied by Deputy Sheriff, Pam Lavarre, who throughout used the cover name of "Elizabeth Saunders" and posed as "Bowers' " girlfriend.

Prior to "Bowers' " and "Saunders' " visits to Dr. Coifman the Hennepin County Sheriff's Department had prepared their agents with the necessary "tools" for their undercover activity. "Bowers" was issued a false driver's license. He carried a false Hennepin County Welfare Assistance Card. With the cooperation of the Edina Police Department, a phony police report was prepared on a Minnesota Department of Public Safety accident form which showed that "Bowers" and "Saunders" had been rear ended by another auto in Edina at 1:10 a.m. on June 16, 1980. "Bowers" was furnished a fake repair bill on a 1977 Ford Van with "Bowers" listed as owner, in the amount of $313.60. At the request of the Hennepin County Sheriff's Department and the Insurance Crime Pre-

vention Institute, State Farm Mutual Insurance Company provided automobile coverage and personal insurance protection for "Bowers". The Travelers Insurance Company provided a liability policy on the driver of the vehicle that had rear ended "Bowers." These arrangements were made in April of 1978, as an aid to authorities in their investigation of suspects Dr. Coifman and his business manager, Nathan Neff. "Bowers" was equipped with a small body transmitter and receiver, which recorded telephonic and personal conversations. He used this device throughout his investigation of Dr. Coifman, Nathan Neff and, later Petitioner.

On June 16, 1978, "Bowers" and "Saunders" visited Dr. Coifman, ". . . with the story that we had been involved in an accident in the early morning hours of that day." "Bowers" complained of "lower back pain" and was given no treatment on that visit nor on his next visit of June 19, 1978. Dr. Coifman, "Bowers", and Coifman's business manager, Nathan Neff, discussed the possibility of a neck brace and hospital treatment for "Bowers". On June 20, 1978, "Bowers" and "Saunders" returned to Dr. Coifman's[1] office. They received no treatment, but Nathan Neff gave "Bowers" the name of a Minneapolis lawyer whom he thought would process his claim. Subsequently, "Bowers" rejected that attorney ("Bowers" thought he would be recognized) but asked Neff for the name of another attorney who would handle the claim. Nathan Neff[2] gave "Bowers" Petitioner's name who was at that time a practicing attorney in the city of Minneapolis.

---

[1] On October 16, 1979, Dr. Coifman pled guilty to three counts of attempted theft-by-swindle and one count of Medical Assistance Fraud for his part in these events. (Hennepin County District Court, Fourth Judicial District of Minnesota, File No. 72573-2.)

[2] On December 13, 1979, Nathan Neff was found guilty by a jury of 14 counts of fraud crimes including five counts of Medical Assistance Fraud for his part in these events. (Hennepin County District Court, Fourth Judicial District of Minnesota, File No. 72573-1.)

On June 22, 1978, "Bowers" called Petitioner's secretary and received an appointment to see Petitioner at his office on June 26, 1978. When "Bowers" and "Saunders" arrived at Petitioner's office on June 26, 1978, Petitioner's secretary had them execute medical release forms and legal retainer agreements. These were signed before they saw Petitioner. "Bowers" wore a soft collar neck brace that day. The recordings of their conversations were played to the jury and typed as an aid to the jury while they listened to the tapes.[3] Petitioner was told by "Bowers" from the start that he was not injured in the alleged accident of June 16, 1978. The initial conversation was:

["O" represents Petitioner; "P" represents "Bowers".]

O: You don't look sick. But with Coifman on, anybody's sick. Is something really wrong with you?

P: *Ah, well, not really. But they decided that I should ah—that I maybe I could get something out of it. So they said I should come and see ya.*

O: Well, I don't want to know anything about that.

P: Then I won't tell you anything about that!

(*State v. Olkon*, —— N.W.2d ——, (dec. August 29, 1980.) Pet. Cert. p. 6. Emphasis added.)

In the first meeting between Petitioner and "Bowers", Petitioner expressed his misgivings concerning Dr. Coifman but said to "Bowers", "I guess I don't want to look a gift horse in the mouth." (*Id.* at A-7.)

Subsequent to this first meeting Petitioner notified the Travelers Insurance Company that a possible cause of action existed against them for the June 16 accident in favor of his

---

[3] The transcripts of the tape were played to the jury pursuant to *U.S. v. McMillan*, 508 F.2d 101 (8th Cir. 1974) *cert. denied* 421 U.S. 916 (1975).

client, "Bowers". Petitioner informed State Farm Mutual that they were to deal directly with "Bowers". Petitioner forwarded the accident report and repair bill to the respective insurance companies.

The Hennepin County Medical Society, who had been investigating Dr. Coifman, at the urging of the Hennepin County Sheriff's Department, delayed the filing of charges against Dr. Coifman for about thirty days. Dr. Coifman's expulsion from the Hennepin County Medical Society, became final on August 31, 1978. Until that date he was considered as a member in good standing. At the request of Petitioner, his secretary phoned the Hennepin County Medical Society in March of 1978 inquiring if they had any complaint on Dr. Coifman's overcharging for services. She was informed that he was a member in good standing and told to call other doctors for fee quotations. In early July of 1978 she called the society again raising the same questions and receiving essentially the same answer.

"Bowers" was admitted to Metropolitan Medical Center by Dr. Coifman, on August 15, 1978, and released on August 24, 1978. While in the hospital he underwent various forms of therapy treatment and was also examined by Dr. Joseph Engel, a consulting physiatrist. Dr. Engel reported to State Farm Mutual, "Bowers" " no fault insurance carrier, that ". . . there was a mild condition that he had and this involved a complaint of his lower back and of his neck". He reported to State Farm Mutual that it was "too early to indicate" any permanency. Dr. Engel also submitted a consultation report.

"Bowers" had no contact with Petitioner after June 26, 1978, until he went to Petitioner's office alone on September 1, 1978. At that time "Bowers" indicated to Petitioner that he had been in the hospital for ten days ". . . and fooled every one in the hospital. . . ." Petitioner responded:

Well that's good, they'll have good medical records, and good medical, ah ya know—but that's not still showing that you're not going to completely heal and have nothing wrong with you two years from now.
(*State v. Olkon, supra.* Pet. Cert. A-33).

On December 15, 1978, "Bowers" carried a medical report from Dr. Coifman to Petitioner. Petitioner was very upset at the medical report because it did not specify the part of the body that indicated permanent disability. Petitioner offered to try to get a new report from Dr. Coifman. (He later suggested an amended report.) Petitioner and "Bowers" discussed this problem as follows:

["O" represents Petitioner; "P" represents "Bowers".]

O: I don't like the report, it's the second time I've told Coifman, you know that, you, say 20 to 25 percent disabled, but they have to name the goddamn part of the body that's disabled. Not disabled because this injury prevents him from returning to gainful employment * * *

* * * *

O: I mean, what he's saying is that there's nothing wrong with you. That's what he's saying. Ah, I can try to settle it with this, but it's not worth the kind of money that he could have—if he's said 20 to 25 percent of the back, the neck, legs, arms, ah—I don't know what the hell's wrong with him. Ya know Neff tells me this is only gonna help you—this doesn't help you.

P: Yeah?

O: Back and neck sprain. Well, —ah—do you want to have him do a new report? Fine. Or I can just send this one out, and try to get something for it.

O: Nathan—you know the least they could do is come up with a hell of a better report than this. The thing is—

you know—he's protecting his ass. It doesn't help if he doesn't say you have a permanent injury, it just says you have 20 to 25 percent disabled, because of the classification of the type of work that you do, that you do manual labor. That doesn't impress State Farm. That doesn't make sense whether you're working or not. He says you have a 20 to 25 percent permanent partial injury of a certain part of your body. That's what would be most beneficial.

P: Well, let's see, why don't we see what the insurance companies will say. Will they make an offer, or will you have to—

(*State v. Olkon, supra.* Pet. Cert. A-14.)

Petitioner sent all medical reports and bills to the Travelers and State Farm Insurance Companies and on December 20, 1978, they notified Petitioner that they would be willing to settle. Petitioner negotiated Dr. Coifman's bill to a lower amount from $3,850 to $1,865.50. This lesser amount, however, was not disclosed to the Travelers Insurance Company. Petitioner settled the case for $7,315.60 from Travelers Insurance Company and $4,897.60 from State Farm Mutual. Petitioner retained $1,538 from these amounts in case the Hennepin County Welfare Department would file a lien because they had paid that amount of "Bowers' " medical costs.

On a number of occasions, "Bowers" indicated to Petitioner that he was uneasy about filing these claims and wondered if the insurance companies would investigate or if he would get caught. He was assured by Petitioner that he had nothing to worry about because the case was closed after payment. He told "Bowers" that neither Dr. Coifman nor anyone else would be in a position to complain. "Bowers" and Petitioner discussed this problem in part as follows:

["O" represents Petitioner; "P" represents "Bowers".]

P: Okay, I've heard stories now about insurance investigators following people around to find out if they were really hurt. Am I going to have to watch out?

O: Your case is over. Your case.

P: Okay, I don't * * * Okay, it doesn't make any difference if * * *

O: Because if you don't * * *

O: The only problem you've got is from welfare or from Coifman. That's the only problem you've got. You say that Coifman * * *

P: Coifman, Coifman ain't gonna argue with this because he knows that * * *

O: You told me that he didn't do half the work that he said he did.

P: * * * He knows he didn't, get [sic] knows *that I wasn't hurt right from the get-go.*

O: *Okay, I know that, you told me that, and that's why I settled for what you asked me to settle for* * * *

O: and there's isn't any two ways about it, that's ah * * *

P: He's not going to argue about that.

O: That, that, I've got certain risks here and my risks are if welfare comes I've got to pay them. That's what I'm holding the money for.

P: Okay.

O: I'm writing the letter the way I'm writing it, ya know, to protect myself. I don't trust Neff.

P: Well, Neff, Neff ain't going to say nothing's either because * * * I walk in the office and tell him that I wasn't hurt in the accident and Coifman asks me how bad do I want to have been hurt.

O: Ya.

P: He ain't gonna argue with this.

O: I don't like to hear you tell me that. I don't even want to know that.

P: All right. I didn't tell you that.

(*State v. Olkon, supra.* Pet. Cert. A-17, 18. Emphasis added.)

"Bowers" told Petitioner that if he (Petitioner) wanted to withdraw from his representation he could do so:

["P" refers to Bowers.]

P: Because, ah—as a matter of fact I would say that if—if you're worried about me, maybe you should—*maybe I should go find some other attorney*—if—ah—I mean they're sure not gonna.

* * *

P: Sure. And after you check that over, *and decide you don't want me around,* just let me know.

(*State v. Olkon, supra.* Pet. Cert. A-40. Emphasis supplied by the court.)

In a conversation on December 21, 1978, Petitioner advised "Bowers" that he should not have another accident for five years:

["P" refers to Bowers and "O" refers to Petitioner.]

P: Well, ah, if I get in any trouble or anything I'll give you a call. And maybe you can help me out there.

O: He's not going to give you any problems.

P: No, I don't mean that, I mean if ever I get in any trouble or some, well, maybe I'll have an accident next year. This is an easy way to make some money.

O: Well, but they're going to know you have a pre-existing claim now.

P: Ya, that's true.

O: Ya, but it's not an easy way * * *

P: You couldn't do that, too often, I suppose.

O: No.

P: Aggravate * * *

O: You went in the hospital, ah, the hospital's gonna have records now Coifman's put things there.

P: Yeah.

O: Ah, people have accidents several times a year, but, ah, it doesn't work after the first one if it's too often. *You shouldn't have another one for five years if you want to make money.*

(*State v. Olkon, supra.* Pet. Cert. A-20. Emphasis added.)

On January 14, 1979, a search warrant was executed at Dr. Coifman's office and his files seized. On January 17, 1979, a search warrant was executed at Petitioner's office and all his files in conjunction with this case were seized. Petitioner was charged with two counts of conspiracy to commit theft-by-swindle over $2,500 and two counts of attempted theft-by-swindle over $2,500.[4] In accordance with Minnesota Procedure, Petitioner elected to waive a jury trial on the defense of entrapment. Evidence was heard and decided by the trial court against him. (Trial court's Order and Memorandum dated August 16, 1979. Pet. Cert. A-56-73.)

Petitioner was found guilty by the jury of two counts of attempted theft-by-swindle on December 20, 1979. Petitioner appealed his conviction to the Minnesota Supreme Court. Oral

---

[4] "The indictment against defendant originally alleged a conspiracy between defendant, Powers-Bowers, 'and other.' The 'and others' language was deleted prior to trial. Therefore, the trial did not concern any conspiracy between defendant and Coifman and/or Neff." *State v. Olkon, supra.* Pet. Cert. A-24.

argument was heard on May 27, 1980. On August 29, 1980, the Minnesota Supreme Court, in a 6 to 2 decision affirmed Petitioner's conviction. On September 29, 1980, the Minnesota Supreme Court denied Petitioner's Petition for Reargument.

ARGUMENT

I. THE PETITIONER'S AFFIRMATIVE DEFENSE OF ENTRAPMENT WAS PROPERLY REJECTED BY THE TRIAL COURT AND BY THE MINNESOTA SUPREME COURT WHICH CORRECTLY APPLIED THE OVERWHELMINGLY PREVAILING VIEW OF THE DEFENSE AS ENUNCIATED BY THE UNITED STATES SUPREME COURT.

A. The Trial Court Found That No Entrapment Existed.

Beginning July 1, 1975, when the new Minnesota Rules of Criminal Procedure went into effect, the defense of entrapment can be decided by the trial judge or the jury at the election of the accused. In *State v. Grilli*, 304 Minn. 80, 230 N.W. 2d 445 (1975) the Minnesota Supreme Court established this procedure:

> We hold that, following complaint or indictment and at a time prior to the commencement of trial, a defendant shall elect whether to have his claim of entrapment presented in the traditional manner as a defense to the jury, or to have it heard and decided by the court as a matter of law. *Id.* 230 N.W.2d at 455.

In the Federal Courts:

> When the evidence presents no genuine dispute as to whether the defendant was entrapped, there is no factual

> issue for the jury, and the judge has a duty to rule on the defense as a matter of law. (Citation omitted) (*United States v. Jabara*, 618 F.2d 1319 (9th Cir. 1980).[5]

In the instant case, Petitioner elected to submit his claim of entrapment to the trial court which acted as the finder of fact and law. The trial court listened to the appropriate government tapes of conversation between Petitioner and the undercover agent and heard testimony from the Petitioner before making his findings of facts and conclusions of law. At that hearing, the burden was on the Petitioner to raise by a fair preponderance of evidence the issue of entrapment. Once such an issue was raised, the burden then devolved upon the state to prove beyond a reasonable doubt that the Petitioner was predisposed to commit the crimes charged. *State v. Grilli, supra.* 230 N.W.2d at 456. This shifting burden is not unlike that followed in the federal courts where upon the government's introduction of predisposition evidence, a jury question is presented. *United States v. Williams*, 613 F.2d 560 (5th Cir. 1980).

The trial court found as a matter of law:

> Law enforcement officers did not seek out the defendant in our present case. They were engaged in an investigation of other persons, and it was a referral by one of those being investigated which brought the government's agents to the defendant. The undercover officers engaged in no conduct involving persistent solicitation, repeated requests or appeals to sentiment and sympathy in the face of obvious reluctance or hesitancy such as condemned by

---

[5] The federal jury instruction as found in 1 E. Devitt and C. Clarkmar, *Federal Jury Practice and Instruction* Sec. 13.13, at 290-91 (2d ed. 1979), has been typical, as noted and approved by this Court in *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1537, 34 L.Ed.2d 355 (1973).

the Supreme Court decisions, but merely afforded an opportunity to the defendant. The opportunity was offered in defendant's own office, and the *defendant was not led; he chose the path.* The defendant was not entrapped. (Memorandum in Support of Order After Omnibus Hearing.)

(Pet. Cert. A-72). (Emphasis added.)

B. The Minnesota Supreme Court Correctly Followed The United States Supreme Court Decisions.

On appeal the Minnesota Supreme Court in *State v. Olkon*, —— N.W.2d —— (dec. August 29, 1980) (Pet. Cert. A-1 through A-53), the Minnesota Supreme Court applied an entrapment defense consistent with the long-standing majority view of this Court in *Sorrells v. U.S.*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed.2d 413 (1932); *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) and *United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1537, 36 L.Ed.2d 355 (1973).

Despite Petitioner's protestations to the contrary, the entrapment concept as set forth in the above and in *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), is clearly the prevailing law. There is no "confusion" and "conflict" in the United States Circuit Courts of Appeal to this day. The Minnesota Supreme Court, in *State v. Olkon, supra* correctly applied the federal view of the entrapment defense.[6]

---

[6] Twenty-six 1980 entrapment cases in the United States Circuit Courts of Appeal were examined. In all twenty-six cases, the courts applied the so-called subjective test as enunciated in *Sorrells, Sherman, Russell,* and *Hampton.* Cases examined were:
United States v. Annese, —— F.2d —— (1st Cir., dec. Sept. 22, 1980)
United States v. Artnsa, 618 F.2d 192 (2d Cir. 1980)
United States v. Bocra, 623 F.2d 281 (3d Cir. 1980)
United States v. Bradsby, 628 F.2d 901 (5th Cir. 1980)

C. Petitioner Was Ready And Willing To Commit The Crimes Of Attempted Theft.

Petitioner seeks to portray to this Court that somehow, out of the blue, government undercover agents descended upon him, a practicing lawyer, and using various illegal methods tricked him into committing the crimes. This picture is not substantiated by the record.

A Hennepin County Deputy Sheriff, assuming the role of undercover agent, was investigating medical fraud cases involving the theft of public funds. He was equipped with a false driver's license, a fictitious name, a false Hennepin County Welfare Assistance Card, a phony police report of an accident, a fake repair bill, and phony insurance policies on himself. The above "tools" were all possessed by "Bowers" *prior* to any connection whatsoever with Petitioner. But none of these fabrications are inducements, they are merely tools for allaying suspicion. As a natural continuation of this type of investigation

---

United States v. Brandon, —— F.2d —— (9th Cir., dec. Oct. 22, 1980)
United States v. Caron, 615 F.2d 920 (1st Cir. 1980)
United States v. Carreon, 626 F.2d 528 (7th Cir. 1980)
United States v. Dobson, 609 F.2d 840 (5th Cir. 1980)
United States v. Elordury, 612 F.2d 986 (5th Cir. 1980)
United States v. Fera, 616 F.2d 590 (1st Cir. 1980)
United States v. Geders, 625 F.2d 31 (5th Cir. 1980)
United States v. Goodwin, 625 F.2d 693 (5th Cir. 1980)
United States v. Grassi, 616 F.2d 1295 (5th Cir. 1980)
United States v. Hill, 626 F.2d 1301 (5th Cir. 1980)
United States v. Jabara, 618 F.2d 1319 (9th Cir. 1980)
United States v. Jimenez, 613 F.2d 1373 (5th Cir. 1980)
United States v. Karas, 624 F.2d 500 (4th Cir. 1980)
United States v. Keller, 624 F.2d 1154 (3d Cir. 1980)
United States v. Lentz, 624 F.2d 1280 (5th Cir. 1980)
United States v. Meacham, 626 F.2d 503 (5th Cir. 1980)
United States v. Murzyn, —— F.2d —— (7th Cir., dec. Oct. 3, 1980)
United States v. Navar, 611 F.2d 1156 (5th Cir. 1980)
United States v. Nunez-Rios, 622 F.2d 1093 (2d Cir. 1980)
United States v. Vallencia, —— F.2d —— (2d Cir., dec. Sept. 18, 1980)
United States v. Williams, 613 F.2d 560 (5th Cir. 1980)
United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980)

"Bowers" considered it necessary to ask suspect Nathan Neff for a referral to an attorney. While he rejected the name of the first attorney referred, he nonetheless was given Petitioner's name by suspect Nathan Neff. As part of his investigation into fraud in connection with public funds, he contacted Petitioner in his office. The only added "tools" that "Bowers" used in connection with Petitioner were a delay secured from the Hennepin County Medical Society in their contemplated proceedings against Dr. Coifman and an agreement with the State Farm Mutual and the Travelers Insurance Companies that they would not resist the processing of injury claims to the point of litigation.

The difficulty of detecting consensual crimes—transacted in private with no complaining witnesses—has led this Court to approve the use of decoys, tricks, concealments, deception and other ruses by authorities. *Sorrells v. United States, supra.* These techniques have been accepted by courts to the present. See *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966); *United States v. Ordner*, 554 F.2d 24 (2nd Cir. 1977); *United States v. Fera*, 616 F.2d 590 (1st Cir. 1980) and *United States v. Bocra*, 623 F.2d (1980).

The Minnesota Supreme Court in *State v. Olkon, supra* correctly identified the two main inquiries in considering an entrapment defense following *Sorrells, supra*; *Sherman, supra*; *Russell, supra*; *and Hampton, supra.* Basically these two questions are: (1) Whether the accused was predisposed to commit the crime charged, and (2) "the extent of the government provision of aid, incentive, and opportunity" *United States v. Goodwin*, 625 F.2d 693 at 697 (5th Cir., dec. September 12, 1980). Petitioner's claim survives neither of the above tests.

In *United States v. Hill*, 626 F.2d 1301 (5th Cir., dec. October 2, 1980) the defendant was convicted of sale of a stolen automobile in violation of 18 U.S.C. § 2313. The government agent, Spillers, a Mississippi Bureau of Narcotics undercover agent posed as a trafficker of stolen automobiles. He met and negotiated with defendant, such conversations being secretly tape-recorded. A few months later defendant procured a stolen car from Illinois which was sold to the agent. The evidence showed that it was agent Spillers who first sought out and contacted defendant and who even proposed the illicit transaction. The Circuit Court held that this inducement was not fatal to the government since the agent had not exerted "persuasion" or even "mild coercion" on the defendant.

In the instant case "Bowers" exerted less inducement than the agent in *Hill*. During their first conversation, "Bowers" told Petitioner that he was not really hurt but that ". . . they wanted him to get something out of it." Petitioner knew from the beginning that he was dealing with a phony injury. "Bowers" inquired—he did not persuade—and he found Petitioner a willing partner. The record is clear that "Bowers" merely presented the opportunity to a "ready and willing" attorney. The taped transcript reveals no evidence that the agent "persuaded," "coerced," "lured," "lulled," "browbeat," "ensnared," or "implanted the criminal design" in the mind of Petitioner. Whenever "Bowers" broached the delicate subject of the impropiety and illegality of the processing of the claims, Petitioner would shut him off in words such as "I don't want to hear about that." No improper inducement on the part of the government agent can be found when the agent himself suggested to the Petitioner: "If you want me to go get another attorney, just let me know."

Was the Petitioner, a practicing attorney without any prior criminal record, "predisposed" to commit the attempted

thefts? The defendant in *United States v. Ordner*, 554 F.2d 24 (1977) had no prior convictions. He was not, prior to the incident that led to his conviction, under any surveillance. The court indicated, "to the contrary, he appears to have been a family man with a wife and children, conducting his trade as a professional blaster." *Id.* at 27 The evidence of predisposition is to be found in the conduct of the accused. *United States v. Russell, supra.* In *Ordner* the court found him to be "a willing and indispensable party." The court held that the jury properly found him to have been predisposed in light of his "ready response to inducement." *Id.* at 28. In the instant case, "Bowers" and "Saunders" signed a contingent fee retainer agreement prior to even speaking or seeing Petitioner. In spite of "Bowers" indication that he wasn't really hurt, that he had fooled the doctors, and in spite of his expressed fear to Petitioner that he may get caught, and in spite of his direct offer to seek another attorney, Petitioner pursued the phony claim.

Petitioner sought to explain his statements to "Bowers" such as "you shouldn't have another accident for another five years" by saying that he was just humoring him and that he didn't really mean such statements. The identical claim was unsuccessfully made in *Ordner* where the defendant claimed that he was just "shooting him a line."

Petitioner's claim that he could—with impunity—rely on the medical reports to the effect that "Bowers" had some prior undisclosed back problems is unfounded. Petitioner knew from past experience that Dr. Coifman's reports were contrived. The fact that Dr. Engel believed "Bowers" to have a ". . . minor sprain and nerve root irritation" (Pet. Cert. A-8) was not evidence of injury necessarily occurring in an accident. Petitioner, an experienced personal injury lawyer, avoided

inquiry into the proximate cause of the condition reported by Dr. Engel in view of "Bowers'" statement that he had "fooled" everybody while in the hospital.

Petitioner's allegation that police conduct was calculated to convince him that filing claims was "not unlawful" (Pet. Cert. 14) has no basis in the overall record. Petitioner acknowledged to "Bowers" that he, "Bowers", had told him that he wasn't hurt ". . . and that's why I settled for what you asked me to settle for. . . ." (Pet. Cert. A-18). This argument merely alleges that Petitioner lacked the requisite intent to commit the crimes. This claim—inconsistent with entrapment is waived in the federal system, (see *United States v. Hill, supra* at 1306), and was decided against Petitioner below.

D. No Compelling Reasons Exist To Abandon The Subjective Test Of Entrapment.

Petitioner, relying on the dissent by two justices in *State v. Olkon, supra* (Pet. Cert. A-44 to 53) urges this Court to abandon its long-standing subjective entrapment doctrine in favor of the minority objective test. This Court is again being asked to do what it refused to do as recently as 1976 in *Hampton v. United States, supra.* Petitioner notes that in recent years five state courts have adopted the objective test and eleven jurisdictions have done so by statute. He notes the fact that the weight of "scholarly" opinion favors the objective test. *State v. Olkon, supra,* dissent (Pet. Cert. A-51).

Petitioner fails to prove to this Court as to why its position is outmoded. The few departures from this Court's majority position can hardly be considered a ground swell crying for a change. This Court's majority position is followed by the United States Courts of Appeal. In the 1980 Circuit case study

(see footnote 6, *supra*) of twenty-six cases, all followed this Court's majority position. While a few of them discussed the various approaches to entrapment, including the due process inquiry, it is quite clear that *Hampton* has settled this question.

Petitioner has not demonstrated any compelling need to reverse *Hampton*.[7] Uniquely, Minnesota incorporates one advantage of the objective test i.e. entrapment rulings are by the judge instead of the jury. *State v. Grilli, supra.* Just as Minnesota was free to adopt this procedure, it is free to adopt—under our federal-state system—its own version of the non-constitutional defense of entrapment. This is especially true when it adopts, as it has done, the view of this Court.[8]

---

[7] The objective test is actually less desirable because it would increase the risk of ". . . greater unjust treatment of individual defendants and the possibility of benefits upon police conduct is not strong enough to take the risk." See Park, *The Entrapment Controversy,* 60 Minn.L.Rev. 163 at 170 (1976); Defeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory, and Application,* 1 U.San Fran.L.Rev. 243 (1967).

[8] Had the court applied the minority concept of entrapment Petitioner would not be successful since "Bowers" only provided him the *opportunity* to commit the offense. See Model Penal Code Sec. 2.13 (Official Draft 1962), *United States National Commission of Reform of Federal Criminal Code* Sec. 702(2) (1971) (called Brown Commission Proposal) and *Grossman v. State,* 457 F.2d 226 (Alas. 1969) the first of the five state courts to adopt the minority position by judicial decision.

II. PETITIONER WAS NOT DENIED DUE PROCESS.

Petitioner seeks to convince this Court that because his crimes were not contraband offenses, the law in *Hampton, Russell, Sherman,* and *Sorrells* should be inapplicable. Further, Petitioner would have this Court believe that the actions of the government agent "Bowers", manifested such "overinvolvement" that the due process clause of either the Fifth or the Fourteenth amendments should be invoked. Petitioner suggests that his case may be the type of case referred to by Justice Powell in his concurring opinion in *Hampton, supra.* Justice Powell said: "Nor have we had occasion yet to confront Government overinvolvement in areas outside the realm of contraband offenses." *Hampton v. United States, supra* at 493.

A. The Law Of Entrapment Should Be Applied Uniformly In All Cases.

Petitioner's urging that the rules of entrapment should be different in his case finds no support in case law. Since *Sorrells, supra,* the defense of entrapment has been invoked in a wide variety of situations. These include: narcotics, liquor, burglary, counterfeiting, price control, gas rationing, selective service, attempted abortion, obscene material, sexual offenses, larceny, fish and game laws, gambling and lotteries, contempt proceedings, bribery, conspiracy, and doubtless other areas. The annotations cited by Petitioner (Pet. Cert. FN. 6, A-25), which Petitioner says demonstrates ". . . the diversity of approaches in noncontraband entrapment and due process cases," reflect only a listing of the diverse types of cases where entrapment has been asserted. These compilations show only that the elements of the defense of entrapment have been em-

ployed in the same way regardless of the offense. Petitioner presents no cogent reason why his case is different from any other.[9]

Indeed undercover operations have been permitted where the crime to be detected is committed in secret by consenting parties who are not likely to complain. In principle the privacy of a law office, with statutory protection for a client,[10] provides a better setting than the normal location for consensual crimes, e.g. a street corner. Petitioner's argument that this type of crime is easily detected because "Doctors, lawyers, and insurance companies all keep thorough records on cases" is unconvincing.[11] Seventeen of the twenty-six 1980 cases examined in the Circuit Courts of Appeal (see footnote 6, *supra*) involved narcotics, two involved stolen goods, one involved bribery, one involved illegal wiretap, four involved illegal firearms, and one involved racketeering.[12] In all these cases the subjective test was applied uniformly.

B. There Was No Denial Of Due Process.

Petitioner relies on *dicta* in *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973) for his claims of violation of due process. In *Archer* the court did not apply the due process standard. The case was decided on the grounds of federal over-

---

[9] The incidence of medical assistance fraud in the United States is rising. See Department of Health, Education and Welfare, *Annual Report*, Office of Inspector General, January 1, 1979-December 31, 1979 (March 31, 1980). Investigations like the one in Petitioner's case are necessary to combat medical assistance fraud.

[10] Minn. Stat. Chap. 595.02(2) 1978.

[11] *State v. Olkon, supra*, dissent (Pet. Cert. 22).

[12] Minnesota initially followed this Court's definition of entrapment in a prostitution case. *State v. Poague*, 245 Minn. 438, 72 N.W.2d 620 (1955).

involvement in federal-state relationships even though government agents had participated in perjury. Petitioner can find no support in the case law since *Archer*.

Justice Rehnquist's opinion in *Hampton*, following *Russell*, *Sorrells*, and *Sherman*, is the overwhelming majority rule. The concept expressed in these cases, i.e. that entrapment is a statutory nonconstitutional defense, is still sound. An excellent summary of the present status of ". . . the close relative of the entrapment defense which may be referred to as the outrageous involvement defense", *United States v. Wylie*, 625 F.2d 1371 (9th Cir. 1980) at 1377, is to be found in *United States v. Lentz*, 624 F.2d 1280 (D.C. Cir. 1980). See also *United States v. Jannotti*, —— F. Supp. ——, 28 Cr.L. 2241 (dec. November 26, 1980).[13]

The cases cited in *Lentz, supra*, where courts have *held* that government conduct has been so "outrageous" so as to violate due process have facts manifestly different from those in the instant case. In *Rochin*, cited by the court in *Russell, supra*, the defendant was forced to try to vomit the pills and forced to have his stomach pumped. In *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), the government agent directly and continuously created and maintained the criminal operation. In *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the defendant was completely directed by the government agent throughout and ". . . contributed nothing in terms of expertise, money, supplies or ideas."

---

[13] In this "Abscam" case the United States District Court for the Eastern District of Pennsylvania applied the due process test. Presumably, this case provides a better factual context for discussing due process than the Petitioner's case, where there was no entrapment, much less a denial of due process.

Petitioner has not shown a violation of a personal right as he must do under *Hampton, supra.*[14] See also *United States v. Meacham*, 626 F.2d 503 (5th Cir. dec. September 26, 1980). This case decidedly is not the case envisaged by Justice Powell in *Hampton, supra.* Petitioner was an experienced attorney with a professional responsibility to conduct his affairs "within the bounds of the law."[15]

Petitioner chose to pursue claims for an injury knowing it to be false. He could have refused to accept the case from the outset. He could have discontinued his representation when that course was specifically suggested to him by the government agent. Petitioner's claim is like that of the "willing" defendant in *United States v. Caron*, 615 F.2d 920 (1st Cir. 1980), who's due process claim provoked the court to conclude:

> We find it hard to think that anyone could believe this to be such outrageous government undercover activity as to violate due process. The only outrage was that defendant was taken in.
>
> *Id.* at 921.

---

[14] In *United States v. Nunez-Rios*, 622 F.2d 1093 (2nd Cir. 1980) the court held that because defendant had not asserted "outrageous government inducement" before trial he had lost his right to allege it on appeal, citing Federal Rules of Criminal Procedure 12 (b) (2).

[15] *Code of Professional Responsibility for Minnesota Lawyers*, (Promulgated 1970).

CONCLUSION

This Court should decline to issue a Writ of Certiorari to the Minnesota Supreme Court. Neither the majority nor minority tests for this defense supports Petitioner's claims, and his case is in no way unique. Petitioner has not shown why this Court's long-standing majority position on entrapment should now be discarded. Petitioner has failed to show a violation of his constitutional rights.

This Court should affirm the decision of the Minnesota Supreme Court and the trial court. The question presented does not merit the attention of this Court.

Respectfully submitted,

WARREN R. SPANNAUS
Attorney General
State of Minnesota
102 State Capitol
St. Paul, MN 55155
THOMAS L. JOHNSON
Hennepin County Attorney
VERNON E. BERGSTROM
Chief, Appellate Section
MICHAEL McGLENNEN
Assistant County Attorney
THOMAS A. WEIST
Assistant County Attorney
ANNE E. PEEK, Esq.
By: VERNON E. BERGSTROM
Phone: 348-3127
A-2000 Government Center
Minneapolis, MN 55487
Attorneys for Respondent